U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: February 9, 1994
CASE NO. 88-ERA-9

IN THE MATTER OF

JOHN A. CORDER,

COMPLAINANT,

v.

BECHTEL ENERGY CORPORATION,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER

The administrative law judge (ALJ) in this case arising under Section 210 (the employee protection provision) of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1982), issued a [Recommended][1] Agreed Order of Dismissal with Prejudice (Order of Dismissal) on October 28, 1988. The Order of Dismissal stated that "all matters in and related to this cause have been concluded by compromise and settlement.

The Order of Dismissal indicated that the ALJ had reviewed the settlement and then permitted it to be "withdrawn" and retained by counsel for Respondent. A copy of the settlement was not made part of the record at that time. On December 15, 1988,

the ALJ issued an Order Sealing Transcript which purported to place the transcript of the proceedings before the ALJ on October 24, 1988, under seal "[i]n order to honor the request of the parties that the terms of the settlement remain confidential."

On May 25, 1989, the Secretary issued an Order to Submit Settlement which noted that a case under the ERA cannot be dismissed on the basis of a settlement unless the settlement has been reviewed to determine whether it is fair, adequate and reasonable, and that there was a serious question whether an ALJ or the Secretary has the authority under the ERA to seal the transcript of a hearing. The Order to Submit Settlement ordered the parties to submit a copy of the settlement agreement and gave the parties an opportunity to submit briefs on whether the Secretary has the authority under the ERA to seal all or any portion of the record.

Complainant wrote a letter to the Secretary on June 24, 1989, stating that he "was forced to sign [the] agreement with [Bechtel] against my will and moral convictions due to the pressures put on me by my attorney . . . ." A copy of the settlement agreement was attached to Complainant's letter. Complainant also indicated in that letter that he does not concur with the ALJ's order sealing the transcript and requested that the transcript and the settlement be made public. He did not, however, request that the settlement be rejected. On June 29, 1989, Respondent filed a Brief in Support of Authority of Administrative Law Judge James Kerr Re Sealing of Transcript of Hearing Re Settlement (Respondent's brief). The Release and Settlement Agreement, marked "Sealed," and the sealed transcript were attached to the brief as exhibits.

In its brief in response to the Secretary's May 25, 1989 order, Respondent argued that the Secretary or an ALJ has authority to seal any portion of the record in this case under 29 C.F.R. § 18.56 (1993). That section of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (ALJ Rules of Practice) provides:

> On his or her own motion, or on the motion of any party, the administrative law judge may direct that there be a restricted

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> access portion of the record to contain any material in the record to which public access is restricted by law or by the terms of a protective order entered in the proceedings.

Respondent also argued that disclosure of the settlement would violate 18 U.S.C. § 1905 (1982), which prohibits disclosure by government employees of trade secrets and confidential statistical information. Finally, Respondent argued that it would be inequitable to the parties and would not serve any public purpose to disclose the terms of the settlement. Respondent asserted in this regard that disclosure would invade Complainant's privacy [2] and could prejudice Respondent in its settlement negotiations in othe discouraging settlements.

The Secretary has held in a number of cases with respect to confidentiality provisions in settlement agreements that the FOIA "requires agencies to disclose requested documents unless they

are exempt from disclosure . . . ." Plumlee v. Alveska Pipeline Service Co., Case Nos. 92-TSC-7, 10; 92-WPC-6, 7, 8, 10, Sec'y. Final Order Approving Settlements and Dismissing Cases with Prejudice, Aug. 6, 1993, slip. op at 6. See also Mitchell v. Arizona Public Service Co., Case Nos. 92-ERA-28, 29, 35, 55, Sec'y. Final Order Approving Settlement Agreement and Dismissing Cases, Jun. 28, 1993, slip op. at 2 (request to place settlement agreement under seal denied); Davis v. Vallev View Ferrs Authoritv, Case No. 93-WPC-1, Sec'y. Final Order Approving Settlement and Dismissing Complaint, Jun. 28, 1993, 91ip Op. at 2 n.1 (parties' submissions become part of record and are subject to FOIA); Ratliff v. Airco Gases, Case No. 93-STA-00005, Sec'y. Final Order Approving Settlement Agreement Jun. 25, 1993, slip op. at 2 (same); Reid v. Tennessee Valley Auth., Case No. 91-ERA17, Sec'y. Order Approving Settlement and Dismissing Complaint with Prejudice, Aug. 31, 1992, slip op. at 3 n.1 (same); Daily v. Portland Gen'l. Elec. Co., Case No. 88-ERA-40, Sec'y. Order Approving Settlement and Dismissing Case, Mar. 1, 1990, slip op. at 1 n.1 (same). The hearing record in this case, including the transcript and the settlement agreement, therefore, are agency records which must be made available for public inspection and copying under the FOIA.

In the event a request for inspection or copying of the record in this case is made by a member of the public, therefore, that request must be responded to as provided in the FOIA. If an

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exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. Since no FOIA request has been made, it would be premature to determine whether any of the exemptions in the FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. It also would be inappropriate to decide such questions in this proceeding. Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestors from denials of such requests, and for protecting the interests of submitters of confidential commercial information. See 29 C.F.R. Part 70.

Therefore, the ALJ's order sealing the transcript of the October 24, 1988, hearing in this case is reversed, and the record in this case shall be available for inspection and copying in accordance with the FOIA and the procedures in 29 C.F.R. Part 70.

The Release and Settlement Agreement (Agreement) in this case has been reviewed and, for the reasons discussed below, I reject it and this case will be remanded to the ALJ for further proceedings consistent with this order.[3]

Under paragraph 5 of the Agreement, Complainant "agrees to withdraw and forever cease his participation in the [Nuclear

Regulatory Commission] Proceeding and the [Public Utilities Commission] Proceeding." Under paragraph 6, Complainant agrees, except as "required by law," not to make any "disclosure, comment or other communication concerning . . . any and all claims, allegations, or assertions, of whatever description . . . regarding or related to [the South Texas Nuclear Plant], including [Complainant's] employment at [the South Texas Nuclear plant] and its termination, and the design, engineering, construction, materials, equipment, safety, maintainability, operability, viability, prudence, or personnel associated with the [South Texas Nuclear Plant]."

Paragraph 6 of the Agreement in this case would prohibit Complainant, among other things, from providing information tot or assisting or cooperating with, the Department of Labor in investigations of complaints against Respondent or involving the South Texas Nuclear Plant under the ERA or any other environmental whistleblower protection statute. Paragraph 6 also would prohibit Complainant from providing information or

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assisting or cooperating with the Department of Labor or any other federal or state agency in the investigation or prosecution of any charge of discrimination or wrongful employment practices, in violation of any federal or state law, rule, or regulation. This could include, for example, the Fair Labor Standards Act, the Occupational Safety and Health Act, Executive Order No. 11,246, Section 503 of the Rehabilitation Act of 1973, and Title VII of the Civil Rights Act of 1964. This provision appears to prohibit Complainant from voluntarily testifying or otherwise participating in any proceeding or investigation involving the South Texas Nuclear Plant, including Nuclear Regulatory Commission licensing or safety proceedings or investigations, and state regulatory or rate proceedings or investigations. This prohibition also could include investigation or enforcement proceedings by the United States Environmental Protection Agency. The only exception to these restrictions would be where Complainant is "required by law to respond to any inquiries, subpoenas, and other legal process . . . ." Agreement, Para. 6(b).

I find that these provisions of the Agreement would have the effect of drying up channels of information for the Department of Labor in ERA cases and under other laws, as well as for other agencies in carrying out their responsibilities. Although I note that the NRC has directed all licensees and contractors to notify complainants who are parties to settlement agreements which restrict the right of the complainant to provide information to the NRC that such provisions will not be enforced, NRC directive of April 27, 1989 (copy attached), the restrictions of paragraph 6 here are considerably broader. See discussion above. Although Secretaries of Labor have in the past found such provisions of settlement agreements void as against public policy, severed those provisions and approved the remainder of the agreement, see, e.q., Polizzi v. Gibbs & Hill, Inc., Case No. 87-ERA-38,

Sec. Order Rejecting in Part and Approving in Part Settlement Submitted by the Parties and Dismissing Case, July 18, 1989, slip op. at 5-7, the Fifth Circuit has held that the Secretary has no authority to alter the terms of a settlement agreement reached by

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the parties. Macktal v. Secretary of Labor, 923 F.2d 1150, 1154-56 (5th Cir. 1991). The Secretary may either approve or disapprove the agreement as written, and if he disapproves the agreement he may negotiate a new settlement or remand the matter for a hearing. Id. at 1156.

Accordingly, for the reasons discussed above with respect to paragraph 6 of the Agreement, I find I cannot enter into this settlement and I reject it. This case is REMANDED to the ALJ for further proceedings consistent with this order.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Under 29 C.F.R. § 24.6 of the regulations implementing the ERA, an ALJ is authorized to issue only a recommended decision which must be reviewed by the Secretary before it becomes final.

[2] This argument would appear to be moot because Complainant stated in his letter of June 24, 1989, that he wants the settlement to be public.

[3] Paragraphs 1, 3, and 4, appear to encompass the settlement of matters arising under various laws, only one of which is the ERA. For the reasons set forth in Poulos v. Ambassador Fuel Oil Co., Case No. 86-CAA-1, Sec. Order, November 2, 1987, slip op. at 2, I have limited my review of the agreement to determining whether its terms are a fair, adequate and reasonable settlement of Complainant's allegations that Respondent violated the ERA.